

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its own) Application No. NG-0035/PI-115
 motion, seeking to investigate the interactions)
 among aggregators, suppliers and jurisdictional)
 utilities operating a customer choice program.)

RESPONSES OF KINDER MORGAN RETAIL ENERGY
SERVICES COMPANY TO ISSUES RAISED BY THE NEBRASKA
PUBLIC SERVICE COMMISSION IN ITS ORDER OPENING DOCKET

By its Order Opening Docket in the above-referenced docket, entered on May 2, 2006, the Nebraska Public Service Commission (“Commission”) requested comments on issues pertaining to the participation of aggregators in the Nebraska Choice Gas Program operating on the system of Kinder Morgan, Inc. (“Kinder Morgan”). Kinder Morgan Retail Energy Services Company (KMRES) welcomes the opportunity to provide its views on the issues listed by the Commission and related matters.

KMRES is a wholly-owned subsidiary of Kinder Morgan, the administrator of the Nebraska Choice Gas Program, and operates as a supplier in the Nebraska Choice Gas Program on behalf of Kinder Morgan Choice Gas Supply which is a division of Kinder Morgan. (KMRES was certificated by the Commission to provide services as a Competitive Natural Gas Provider by its Order entered March 29, 2005 in Application No. NG-0027.) Through its dealings with the firm that attempted to provide aggregation services during the selection period for the current Choice Gas Program year, RnD Energy LLC (“RnD Energy”), KMRES has direct knowledge to share with the Commission regarding the issues raised by the Commission in this

investigation.¹

A. The Commission Should Ensure that Aggregators are Subject to Appropriate Regulations

The first issue raised by the Commission is as follows:

Whether the Commission should promulgate rules and regulations to address the relationship between aggregators and suppliers in a customer choice program. If so, what issues should be addressed?

The ninth year of the Nebraska Choice Gas Program commenced on June 1, 2006.

KMRES and its predecessors have participated as a supplier in the program since its inception in 1998. The experience gained during that period demonstrates the need for specific rules that govern the conduct of all participants in the program – from the program administrator, Kinder Morgan, to the participating suppliers, which includes KMRES, to firms such as RnD that intend to provide aggregation services, to the customers receiving service through the Choice Gas Program. Without appropriate rules, each participant will act in its own self-interest, which can lead to results damaging to the program.

In order to be successful, an aggregator needs to convince consumers that it can save them money on their commodity purchases. The need to make this showing has led RnD Energy to make numerous unprovable claims regarding its ability to achieve this result for customers. For instance, in the run-up to the 2006 annual selection period, which in Nebraska runs for two weeks in April, the following statements appeared on RnD's website (www.rndenergy.com) or in a RnD Energy television advertisement:

¹ KMRES responded to requests for bids from RnD Energy with respect to consumers located in Nebraska and Wyoming. KMRES understands that RnD Energy selected the bid submitted by another supplier in Wyoming, and rejected all bids that it received in Nebraska.

“We use our market experience and knowledge to negotiate the best price for our members during the Choice Gas selection period”

“Save money on natural gas bill”

“Join our pool and get a better price”

“Get the same rate as large commercial and industrial users”

“The average consumer could save enough money to pay for one winter month worth of gas”

“Don’t bother calling the suppliers to compare offers”

All of the first four statements are, at best, misleading. They may be true with respect to prices available on certain days under certain pricing options offered by one or more suppliers and with respect to some customers choosing particular options, but are very unlikely to be as broadly true as these statements suggest. KMRES cannot envision a scenario in which the fifth statement could ever be true. The final listed statement belies all of the other statements. If RnD Energy actually thought it could beat the pricing offered by participating suppliers, especially on a consistent basis, it would urge its clients to compare offers to demonstrate the benefits of RnD Energy’s services. Instead, RnD Energy recommends that clients not compare offers. This apparently allows RnD Energy to spin the results of its efforts, regardless of the true state of facts.

Another document currently available on RnD Energy’s website, a 2006 Rate Announcement for Wyoming, contains the following statements:

“We successfully negotiated a price far better than the prices that were posted during the choice gas selection period”, and

“RnD Energy hopes that you will share in the excitement of knowing that for the first time in the Kinder Morgan Choice Gas program, average residential and small business customers were able to band together and receive the same price as

the large end users.”

Again, these statements at best are misleading. RnD Energy cannot have the facts that it would need to have before making these statements. Yet, this spin was repeated in a favorable newspaper article that appeared in the May 4, 2006 edition of the Laramie Boomerang reproduced on the RnD website.

In the view of KMRES, RnD Energy makes these unfounded statements because it knows that they will resonate with consumers that are not very knowledgeable with respect to natural gas markets and pricing. Suppliers are prohibited from this type of conduct by the Supplier Code of Conduct. The Code of Conduct requires that supplier marketing materials must be designed to not mislead consumers with respect to the price of commodity or the services offered by other suppliers.

The Code of Conduct also prohibits suppliers from disparaging other suppliers or misrepresenting the services or prices that they offer. KMRES personnel were present when RnD Energy personnel, in a public setting, disparaged OneoK, Inc., which is a supplier in both the Nebraska and Wyoming Choice Gas Programs.

The inevitable conclusion is that aggregators participating in the Choice Gas Program in Nebraska should be subject to the same obligations and the same restrictions, to the extent practicable, that are applicable to suppliers. Otherwise, an unbalanced playing field will have been created, as it was during the 2006 selection period. A level playing field is essential to the proper functioning of the Choice Gas Program.

B. Reasonable Grounds for Refusing to Successfully Conclude Negotiations with an Aggregator

The second issue raised by the Commission is as follows:

Whether a natural gas supplier can refuse to negotiate with a duly certificated and recognized aggregator on the grounds of the fitness to perform the service of an aggregator.

This issue, as posed by the Commission, puts forth a reason for refusing to negotiate with an aggregator that appears to be limited in scope. KMRES is not sure what was intended by the phrase “fitness to perform the service of an aggregator”. If it is meant to refer to the limited experience that the personnel of the aggregator have with respect to natural gas markets and pricing, then it would seem that the reason is an inadequate basis, at least so long as the aggregator’s actions have not demonstrably hurt natural gas consumers. If, on the other hand, the stated basis is meant to refer to a situation where the aggregator refuses to agree to a reasonable protection requested by the supplier (such as a provision that would require the aggregator to indemnify the supplier for any liability arising from the actions of the aggregator), perhaps due to the aggregator’s financial condition or otherwise, then it might be reasonable for the supplier to conclude that the aggregator is not a suitable business partner and decline to pursue the bid to a successful conclusion.

The point of the foregoing discourse is that it is impractical to attempt to delineate the specific bases that justify rejection of a bid submitted by an aggregator. The only standard that might be appropriate is that the parties must deal with each other in good faith. Good faith in this context means that the parties conduct their marketing in an honest, transparent manner, and that they do not disparage the other party to gain a competitive advantage.

On the other hand, good faith would not obligate a supplier to make a price offer or make

a pricing option available with respect to the aggregated load that it would not make available were the aggregator not involved. Similarly, good faith would not obligate a supplier to make price offerings that are not consistent with its business model. In this regard, one must understand that RnD Energy's approach does not involve merely selecting from available posted price options, but instead relies on negotiated pricing. KMRES engages in only a small amount of negotiated pricing, turning down as many requests for negotiations as it accepts. This discussion points to the need to allow suppliers to respond to requests for bid without interference, allowing good faith business judgment to guide suppliers to the proper course of action.

C. Undue Discrimination Has Occurred Only When the Available Facts Demonstrate its Occurrence

The third issue raised by the Commission is as follows:

Whether failure to honor a customer's choice to use an aggregator's services in a choice gas program constitutes a violation of the non-discrimination clause of the Code of Conduct contained in Kinder Morgan, Inc.'s September 8, 2004 Nebraska Gas Tariff Section 38.2E.

It is our understanding that the term "customer" as used in the Kinder Morgan Code of Conduct and its tariff refers to end users. By definition, an aggregator is not an end user and, therefore, the referenced provision is not applicable to circumstances involving aggregators.

Additionally, as to undue discrimination as a concept, the short answer is that an undue discrimination has occurred when the facts applicable to the event in question demonstrate that undue discrimination has occurred. No hard and fast rules can be established to address an issue that requires a factual context to resolve.

Quite frankly, KMRES finds it somewhat disquieting that the issue is framed as it is. The

Choice Gas Program is about choice, not about dictated results. Suppliers offer multiple pricing options for residential and commercial customers, such as fixed prices, market-indexed prices, market-indexed prices that are capped, price options that represent a blend of fixed and market-indexed prices, and fixed bill price options with larger commercial customers having the opportunity to negotiate price based on their specific needs and usage pattern. There always will be a price offering available to an aggregator and its clients. This issue, as framed, suggests that the Commission might consider a discrimination to have occurred if the supplier and the aggregator cannot work out a price, even when the supplier has made reasonable prices and price offerings available to the aggregator. KMRES respectfully submits that such a scenario does not represent a “failure to honor a customer’s choice to use an aggregator’s services in a choice gas program”, and the Commission would be in error if it concluded otherwise.

D. Bids to Uncertificated Aggregators

The fourth issue raised by the Commission is as follows:

Whether aggregated pools of customers should be offered bids when not represented by a certificated aggregator.

From a purely legal standpoint, it would seem that a person engaging in such a practice has violated the provisions of the State Natural Gas Regulation Act that require aggregators to receive certificate authority from the Commission as a predicate to providing such service.

KMRES will follow the Commission policy regarding the appropriate response to such persons in the event that they approach KMRES for a price quote.

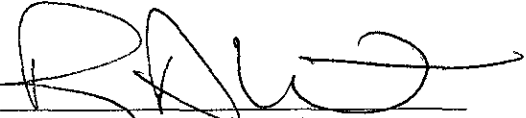
CONCLUSION

KMRES appreciates the opportunity provided by the Commission to share its views on this matter. KMRES intends to participate fully in any further Commission-sponsored activities

(workshops, hearings, etc.) that may occur in the future.

Dated this 2nd day of June, 2006.

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